80-468

Supreme Court, U. S.
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CASE NUMBER:

in the

Supreme Court of the United States

ISRAEL PRECES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respectfully submitted,

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BY:
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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE ARRESTING OFFICERS IN THE ABSENCE OF EXIGENT CIRCUMSTANCES AND IN THE ABSENCE OF A WARRANT VIOLATED DEFENDANT'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY FLORIDA STATUTES 901.19(1) AND 933.09, KNOCK AND ANNOUNCE?

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ISRAEL PRECES,

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-vs-

THE STATE OF FLORIDA,

Respondent.

PETITION TO PRAY THAT A WRIT OF CERTIORARI BE ISSUED TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF FLORIDA ENTERED IN THE ABOVE-STYLED CASE ON AUGUST 21, 1980.

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at So.2d and is printed in the Appendix. The Opinion of the Third District Court of Appeals of the State of Florida is reported at So.2d and is printed in the Appendix.

JURISDICTION

The judgment of the Third District Court of Appeals for the State of Florida was entered on December 18, 1979. Rehearing was denied on January 18, 1980. The judgment of the Supreme Court of Florida was entered on August 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

The Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

In the trial Court below, the Petitioner, ISRAEL PRECES, was the Defendant. The Respondent, THE STATE OF FLORIDA, was the Plaintiff. In this Brief, the parties will be referred to as they stood in the trial Court. The symbol "R" will be used to designate the pages of the Record on Appeal. The symbol "T" will be used to designate the transcript of proceedings held on March 22, 1979.

The Defendant was arrested on February 9, 1978, without warrant. (R-1). Thereafter, the Plaintiff filed a series of accusatory Informations against the Defendant and, co-Defendant, JESUS OMAR REGALADO. (R-1 to 9a). The Information upon which the Plaintiff ultimately relied was filed of record June 6, 1978, and charged the Defendant with Unlawful Sale of Cannabis in an amount more than five (5) grams in violation of *Florida Statute* §893.13, and with the offense of Conspiracy to Possess and/or Deliver in excess of one hundred (100) pounds of Cannabis in violation of *Florida Statute* §893.13 and §777.04

To each of the Informations, and more particularly with respect to the Information filed on June 6, 1978, the Defendant entered a Plea of Not Guilty.

From the initial Arraignment date of March 31, 1978, until the date of hearing upon the Defendant's Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure (June 26, 1978), the Defendant engaged in pre-trial discovery proceedings. On June 26, 1978, an evidentiary hearing was conducted before the Honorable N. Joseph Durant, Jr., Circuit Court Judge, upon the Defendant's Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure. (R-96 to 159). At the conclusion of this evidentiary hearing, Judge Durant entered an Order denying said Motion. (R-51). Thereafter, other matters not being raised in this Appeal transpired.

On February 6, 1979, the Defendant filed a renewed Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure, a Memorandum of Law in support thereof and a transcript of the hearing which was conducted before Judge Durant on June 26, 1978. (R-54 to 95 and 96 to 159). The renewed Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure was heard before the Honorable Ellen Morphonios-Gable, Circuit Court Judge, on March 22, 1979. Those proceedings are before this Court and will be referred to by the symbol "T." (T-1 to 26). At the conclusion of the hearing on the Defendant's renewed Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure, Judge Gable entered an Order denying the

Motions. Thereafter, the Defendant entered a plea of no contest to Count I of the Information wherein he was charged with the offense of Unlawful Sale of Cannabis in an amount more than five (5) grams in violation of *Florida Statute* §893.13. (T-13; R-160). By his plea of no contest, the Defendant specifically reserved the right to Appeal the trial Court's denial of his Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure and the trial Court's denial of his renewed Motion to Suppress Evidence Obtained Through Unlawful Search and Seizure. (T-13, 14, 15). In accepting the plea of no contest as to Count I of the Information, the Court specifically ruled that the issues presented by the Defendant's pre-trial Motions to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure were completely dispositive of the issues between the Defendant and the Plaintiff. (T-13). Subsequent to the acceptance by the Court of the plea of no contest, the Office of the State Attorney abandoned Count III of the Information. (T-23). As to Count I of the Information, the Defendant waived a Pre-Sentence Investigation and, on the same date, was sentenced to a term of (2) years in the state Penitentiary. (T-22).

The decision of the Third District Court of Appeal of Florida affirming Petitioner's conviction was rendered December 18, 1979. Motion for rehearing was denied January 18, 1979. Petition for Writ of Certiorari in the Supreme Court of Florida was denied on August 21, 1980. This Petition of Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

On February 9, 1978, police officers of the City of Miami Police Department were conducting an undercover investigation relating to controlled substances. During the course of this investigation, an individual by the name of Ramirez was detained by the investigating police officers. (R-113.) Ramirez had come to the attention of the investigating police officers through an unrelated narcotics transaction which had been made that same day. (R-113.) Prior to this date, the investigating police officers had not used Ramirez in any fashion as an Informant. (R-113.) As a direct result of the arrest of other persons at the same time that Ramirez was taken into detention, Ramirez began providing information to the investigating police officers.

Ramirez advised the police officers that there was a quantity of Cannabis Sativa L. located at a residence address in Dade County, Florida. The address which Ramirez gave to the police was 9520 Southwest 47th Street, Miami, Dade County, Florida. (R-101.) This address was later determined to be the home of Defendant, ISRAEL PRECES.

Before going to the home of the Defendant, the investigating police officers directed Ramirez to make a phone call to the home. As a result of this phone call, the officers believed that, in fact, a quantity of Cannabis Sativa L. was being kept at this home. (R-115.) In spite of the receipt of this information by the investigating officers through Ramirez, the officers made no attempt

whatsoever to obtain either an arrest warrant or a search warrant before going to the home of the Defendant. (R-115.)

Instead, the undercover police officers and Ramirez met among themselves and arranged to go to the PRECES' residence. It was further arranged that Ramirez and undercover police officer Bobby Meeks would go into the home and attempt to negotiate a purchase of the marijuana. The remaining officers were to remain outside the home in surveillance positions. (R-102.) After some initial confusion in the area of PRECES' home (R-103), Officer Meeks and Ramirez parked the vehicle in which they were traveling in front of PRECES' home, exited the vehicle, approached the home and knocked upon the door. (R-103.) PRECES answered the door and thereafter invited Meeks and Ramirez into his home. (R-103.) Introductions were made among the parties. The persons present were PRECES, co-Defendant JESUS OMAR REGALADO, Ramirez, Meeks and the wife and minor children of PRECES. After these introductions, PRECES invited Meeks and Ramirez to follow him down a hallway into the rear bedroom of the home. Meeks observed a number of cardboard cartons in the rear bedroom of the home which he was invited to open and inspect. (R-104.) Upon inspection, Meeks determined that the content of the cartons was, in all probability, Cannabis Sativa L. (R-104.) While still in the room, negotiations were undertaken with respect to the price for the purchase of the marijuana and, ultimately, a price of $240.00 per pound was arrived at . . (R-104, 105.)

Once this agreement had been reached, the parties exited the rear bedroom, traveled down the hallway and back into the living room of the home. Meeks advised PRECES that he had to go to the car which he parked outside to obtain the money for the purchase of the marijuana. (R-105.) Meeks, who does not speak Spanish, overheard Regalado and PRECES speaking in Spanish. Meeks was then advised by Ramirez that Regalado and PRECES were upset that Meeks wished to leave the house to obtain the money for the purchase. Upon being advised of this, Meeks told PRECES and Regalado that Ramirez would go out to the waiting automobile to get the money and that he, Meeks, would remain inside the home. (R-105.)

As Meeks, PRECES and Regalado awaited the return of Ramirez, brief conversation took place among the parties. Then, Regalado glanced out the front window of the home and, as he did so, apparently observed undercover police officer Raul Martinez running towards the house with a weapon in his hand. Regalado turned to PRECES and stated: "This is a bust." At this same approximate moment, Martinez burst into the home and stated: "This is a bust." Meeks drew his weapon and stated: "Police officer, freeze." (R-106.)

Before undercover police officer Raul Martinez entered the home of ISRAEL PRECES, he did not knock at the door. He did not announce his authority before entering. He did not announce his purpose before entering. (R-117.) Instead, he burst into the home of ISRAEL PRECES without permission, consent or warrant. (R-117.) As he entered the home, his service revolver was drawn and he stated, as mentioned above,

"this is a bust." He further stated: "I'm a police officer." (R-117.) Following immediataely behind Martinez as he rushed into the home were other undercover police officers of the City of Miami Police Department and one Dade County Public Safety Department uniformed officer. (R-117, 118.)

All of the persons in the home other than Ramirez, who remained outside the home, who were not police officers were immediately reduced to the physical custody of the undercover police officers without incident. (R-118, 119, 120.)

Thus, the following persons were detained in the living room of the home: ISRAEL PRECES, his wife, his two (2) minor children, an elderly woman, and co-Defendant Jesus Omar Regalado. The arresting police officers had no cause to believe that any other persons were within the confines of the home. (R-120, 121.)

Among the police officers who had followed Officer Raul Martinez into the home was undercover officer Agras. Officer Agras took it upon himself to begin conducting an immediate room-by-room search of the entire PRECES' home. (R-121, 122.) As soon as PRECES and Regalado were handcuffed and an officer assigned to watch them in the living room, the other police officers then joined in the room-by-room search of PRECES' home. Officer Meeks, as well as other officers, then proceeded down the hallway leading off of the living room to the rear bedroom where they proceeded to search for and seize the cardboard cartons containing marijuana. No warrant was obtained for this search nor was a warrant obtained for the seizure of the marijuana.

Officer Meeks testified that from the living room area where all of the civilian persons were detained or under arrest one could barely see anything in the rear bedroom. He specifically testified that he may *possibly* have been able to see one opaque, cardboard carton in the rear bedroom from the living room area of the home. (R-111, 112.) No permission or consent was obtained to conduct the room-by-room search of the home and no warrant was obtained either. (R-124.)

Officer Meeks admitted that all of the civilians in the home were immediately detained upon the entry of Officer Martinez into the home and he further admitted that there was no impediment to the officers sealing the home while a search warrant was obtained for the marijuana which he believed to be in the rear bedroom. (R-126, 127.)

Officer Raul Martinez testified that while Meeks and Ramirez were inside the home, he waited outside. He further testified that his pre-arranged plan was that Meeks was to exit the home after having seen the marijuana to advise the waiting surveillance officers that the marijuana was present at the home so that an arrest, search and seizure could be effected. (R-137, 138.) He further testified that instead of Officer Meeks exiting the home, the informant, Ramirez, exited the home. He testified that Ramirez told him "Okay, we can. We saw the grass. It's in the house." (R-138.) Officer Martinez instructed Ramirez to sit down in the back of his car, which Ramirez did. Martinez then signaled to two other police units who were across the street to move in on the home. Officer Martinez then

drew his weapon and ran into the home where the events which Meeks testified to and which have been related herein then transpired.

Officer Martinez further testified that the informant, Ramirez, did not tell him that Meeks' safety was endangered in any fashion. Further, Ramirez did not tell Martinez that he had seen any weapons inside the home. (R-139.) The only justification which Officer Martinez offered for his entry into the home without knocking, announcing his authority and announcing his purpose, was that he was fearful for the safety of Officer Meeks. He admitted that this fear was predicated solely upon the fact that Ramirez seemed nervous when he came out to Martinez' car. (R-139.) He also admitted that Ramirez had been told earlier that day that he might be arrested himself. (R-139.) Officer Martinez also testified that the only statement made to him by Ramirez was that the marijuana was in the home and that he wanted to get away from the home . . Ramirez made no statement to indicate, in any fashion, that Meeks' safety had been jeopardized. (R-143.)

SUMMARY OF ARGUMENT

In the absence of exigent circumstances, police officers in conducting a warrantless arrest must comply with the requirements of 'knock and announce'. A failure to comply with 'knock and announce' provisions amounts to a violation of the Defendant's reasonable expectation of privacy as guaranteed by the Fourth and Fourteenth Amendments to the United States

Constitution. As such, the question of 'knock and announce' raises the question of constitutional limitations.

ARGUMENT

THE ARRESTING OFFICERS IN THE ABSENCE OF EXIGENT CIRCUMSTANCES AND IN THE ABSENCE OF A WARRANT VIOLATED DEFENDANT'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY FLORIDA STATUTES 901.19(1) AND 933.09, KNOCK AND ANNOUNCE.

Florida Statute, §901.19(1) provides:

If a police officer fails to gain admittance *after he has announced his authority and purpose* in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

Florida Statute, §933.09 provides:

The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the

warrant, if after due notice of his authority and purpose he is refused admittance to said house or access to anything therein. (From the Record in this cause it is clear that no warrant to arrest or search was issued prior to the arrest, search and seizure. However, *Florida Statute,* §933.09 is included for reference purposes.)

The basis for Florida Statutes §901.19(1) and §933.09 is that an individual inside his house has a reasonable expectation of privacy as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. As such, the violation of 'knock and announce' should and does raise constitutional questions.

The requirement of compliance with 'knock and announce' statutes has been recognized by this Court. *Miller v. United States,* 357 U.S. 301 (1958) and *Sabbath v. United States,* 391 U.S. 585 (1968). In particular, police officers arriving at the front door and merely yelling "Police" is not enough to find compliance with 'knock and announce' requirements. *Miller v. United States, supra.* Nor is yelling "Federal agents, you're under arrest" sufficient. *United States v. Case,* 435 F.2d 766 (7th Cir. 1970). Even though federal agents had actually seen the illegal contraband inside the residence, they must first announce themselves, their purpose, and give those inside an opportunity to refuse admittance. It is only after they are refused admittance that the breaking of the door is permitted. *United States v. Case, supra.*

Nor is the law different in Florida. Where the warrantless arrest is to be made within the home of a

criminal suspect, the provisions of *Florida Statute* §901.19(1), 'knock and announce', come into effect. *Benefield v. State,* 160 So.2d 706 (Fla. 1964).

If one assumes that those facts known to Officer Martinez prior to his entry into the home of ISRAEL PRECES gave rise to probable cause to believe that a felony had been or was being committed, a warrantless arrest would be authorized by *Florida Statute,* §901.15. However, where the warrantless arrest is to be made within the home of a criminal suspect, the provisions of *Florida Statute,* §901.19(1) come into effect. *Benefield v. State, supra.*

In an unbroken line of cases since the *Benefield, supra,* decision, the Appellate Courts of this State have held that where evidence is seized without a search warrant subsequent to a warrantless arrest, the evidence itself must be admissible at trial.

In turn, the lawfulness of the warrantless arrest is determined by the facts surrounding the arrest as those facts related to the requirements of *Florida Statute,* §901.19(1). At least since the decision in *Benefield, supra,* it has been the law of this State that even an arrest predicated upon probable cause can be " . . . vitiated by the unlawful means in which the home was entered." (*Benefield, supra,* at 708.)

The Court in *Benefield* stated that " . . . the act is ambiguous and poorly drawn . . . " However, the Court went on to state:

> As we interpret the common law authorities in relation to §90.19(1), *Florida Statutes,* F.S.A.,

> we conclude that even if probable cause exists for the arrest of a person, our *Statute* is violated by an unannounced intrusion in the form of a breaking and entering in the building, including a private home, except (one) where the person within already knows of the officers authority and purpose; (2) where the officers are justified in the belief that the persons within are in imminent peril of bodily harm; (3) if the officer's peril would have been increased had he demanded entrance and stated the purpose, or (4) where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted.

The Record in this cause is devoid of any suggestion that any of these four (4) exceptions to the provision of *Florida Statute,* §901.19(1) existed.

Until plainclothes police officer Martinez entered the home of ISRAEL PRECES and announced that he was a police officer, neither his authority nor his purpose could have been apparent to anyone. Martinez had no reasonable factual basis to believe that the persons within the home were in imminent peril of bodily harm. Martinez had no reasonable basis to believe that his position or that of Officer Meeks would have become more perilous were he to have knocked at the door of the home and announced his authority and purpose before entering. Martinez had no reasonable justification to believe that by knocking and announcing his authority and purpose at the front door that the persons inside would attempt an escape inasmuch as numerous

surveillance officers were in positions surrounding the home and, plainclothes officer Meeks was already inside the home. Lastly, Martinez could not reasonably have feared that the persons inside the home would destroy any evidence inasmuch as Officer Meeks was inside the home and, in any event, the quantity of Cannabis believed to be in the home exceeded one hundred (100) pounds. (R-8.)

With respect to the last exception to the *Statute,* it should be obvious that a quantity of marijuana in excess of one hundred (100) pounds could not readily be disposed of or otherwise destroyed during the brief interval which it would have taken Officer Martinez to knock at the door and announce his authority and purpose. (See, *State v. Clarke,* 242 So.2d 791 [4th D.C.A. 1970].) Continuing in inverse order, a complete examination of the Record in this cause fails to establish that any of the persons attempted an escape. In fact, the Record shows that upon Martinez entering the home and announcing his authority and purpose, all persons in the home submitted without incident to the arrest.

With respect to the second and third exceptions carved out by *Benefield, supra,* the record similarly fails to establish the reasonable belief that anyone's safety would have been imperiled by compliance with the knock and announce provisions of *Florida Statute,* §901.19(1). The only justification offered by Officer Martinez for his uninvited, "gangbusters" entry into the home was "Q. You relied on all these things he told you, can't you ask him a question whether there is any problem inside of the house? A. When an officer's safety is involved, I would like to find out for myself." (R-144.)

It should go without saying that the persons inside the home, other than Meeks, could not and did not know the identity of Martinez prior to his entry into the home. If they did not know his identity, it would hardly be said that they knew his authority and purpose.

The facts of this case are remarkably similar to those in *State v. Roman*, 309 So.2d 12 (4th D.C.A. 1975). As then Associate Judge Alan R. Schwartz stated:

> For unaccountable reasons, perhaps relating to an entirely incorrect belief that money had to change hands in order to constitute a crime, perhaps because Beckstrom wanted the company of more armed officers (and representatives of the press who apparently were waiting outside the dormitory), however, he did not. After arriving at a price of $20., Beckstrom said he had to go out to his car to get the money. *He then layed the "lid" of Cannabis they were discussing on a table* (emphasis supplied in original) and departed, leaving Officer Sickler (armed and standing by the window) and Cadet Spencer behind in the room.
>
> A few moments later, he returned accompanied by two other officers, all of them with guns drawn. Although Beckstrom testified he knocked before entering, neither officer in the room and one of the students there, heard such a knock (or any announcement of authority as required by F.S. §901.19(1); see *Benefield v. State, supra*). Thus, there can be no doubt that

> the record supports the trial Judge's ruling that no knock occurred. *Cameron v. State,* Fla.App. 1959, 112 So.2d 864. Proceeding, then, without having knocked or announced, Beckstrom, with the other officers, opened the door, barged into the room and simultaneously arrested Roman, and seized the Cannabis which had remained there during Beckstrom's absence. Thereafter, with Roman handcuffed and at gun point, the officers first searched his desk and drawer, discovering further contraband. Then, after Beckstrom told the defendant that if he revealed the location of still other marijuana, he would not be charged further, Roman did so and additional Cannabis was seized.

In *Roman, supra,* the Court went on to affirm the trial Judge's Order of suppression predicated upon the violation of *Florida Statute,* §901.19(1), even though the evidence was seized in plain view after the second, uninvited entry into the home. Similarly, this Court in *Moreno v. State,* 277 So.2d 81 (3rd D.C.A. 1973) held that even partial compliance with *Florida Statute* §901.19(1) is insufficient to establish the legality of an arrest and the subsequent search and seizure of evidence. In *Moreno, supra,* officers went to the home of the Defendant for the purpose of arresting her. Before entering the home, they knocked at the door and shouted, "Police officers." They waited ten minutes thereafter outside the home. Hearing no response, they then entered the home of the Defendant and found her fast asleep. Near her bed they found narcotics and narcotic implements. She was charged with possession of these items. In reversing the trial Court's denial of her

Motion to Suppress Physical Evidence, it was held: "The record before us is devoid of any testimony by the police officers or other competent evidence showing any circumstances that would bring the case *sub. judice.* within any of the four exceptions to the strict dictates of the Statute. Absent such evidence, the fruits of any search conducted pursuant to such arrest must be considered illegally obtained and should have been suppressed."

In *Earman v. State,* 265 So.2d 695 (Fla. 1972), the Florida Supreme Court again construed *Florida Statute* §901.19(1) and stated: "An Appellate Court is not justified in concluding there was such an exception as a matter of law when the record is devoid of any testimony by police officers or other competent evidence showing they had reason to fear at the time of entry the destruction of evidence. Once *Earman* challenged his arrest, the burden of proving its validity as a predicate for the unlawful admission of the seized marijuana in evidence, was upon the State. Essential to such proof in this case is testimony by the arresting officers or other competent evidence that they had reasonable grounds to believe the marijuana within the house would be immediately destroyed if they announced their presence. Absent such evidence, the fruits of any search conducted pursuant to such arrest must be considered illegally obtained." Speculative fears not based upon facts that exigent circumstances exist are insufficient to sustain non-compliance with the strict dictates of *Florida Statute,* §901.19(1). (See, *Ferrara v. State,* 319 So.2d 629 [1st D.C.A. 1975].)

Recently in *Berryman v. State*, 368 So.2d 893 (4th D.C.A. 1979), the law surrounding this Statute was against concisely restated. Even though the intrusion on the rights of the Defendant in *Berryman, supra,* was "slight," and even though "the only deviation from the *Statute* was the failure to announce the purpose for which he was there and the refusal of admittance," the Court held that evidence seized subsequent to the execution of a search warrant otherwise validly issued must be suppressed. As the Court stated in conclusion:

> It is not and should not be the law of this State that police may obtain a warrant and then based on their lack of knowledge proceed in gangbusters' fashion to break down doors and enter homes totally without warning to seize whatever they can find. The conduct of the police here was not of this nature, but the danger of a precedent to this effect is what convinces me the majority opinion in indeed correct. (concurring opinion of Judge Beranek, at page 897.)

In conclusion, it is submitted that the entry by Officer Martinez into the home of the Defendant utterly failed in all regards to comply with *Florida Statute,* §901.19(1). Inasmuch as no evidence exists to establish the applicability of any of the exceptions to the *Statute,* the arrest was unlawful. As a consequence of this unlawful arrest, evidence was seized from the Defendant's home. This evidence was the sole basis for his subsequent conviction and sentence of two (2) years in the State Penitentiary. Inasmuch as this evidence was seized pursuant to an unlawful arrest, it is "fruit of

the poisonous tree," and should not have been admitted as evidence in this cause. (*Wong Sun v. United States*, 371 U.S. 471, 83 Sup.Ct. 407, 9 L.Ed.2d 441 [1963]; *Mixon v State, supra.*)

CONCLUSION

For the above reasons and the authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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BY: _____
WILLIAM R. TUNKEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari To The Supreme Court of Florida, was furnished to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33138, on this the _____ day of September, 1980.

Respectfully submitted,

BY: _____
WILLIAM R. TUNKEY,
Counsel for Petitioner

Appendix

APPENDIX

a. Copy of Opinion of the Third District Court of Appeal, dated December 18, 1979.

b. Copy of Denial of Motion for Re-Hearing, dated January 18, 1980.

c. Copy of Order from the Supreme Court of Florida denying Certiorari, dated August 21, 1980.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT
JULY TERM, A.D. 1979

CASE NO. 79-631

ISRAEL PRECES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed December 18, 1979.

An Appeal from the Circuit Court for Dade County, Ellen Morphonios Gable, Judge.

Weiner, Robbins & Tunkey and William R. Tunkey, for appellant.

Jim Smith, Attorney General and Susan Minor, Assistant Attorney General, for appellee.

Before PEARSON, HUBBART and NESBITT, JJ.

NESBITT, Judge.

This is an appeal from an order denying a motion to suppress physicial evidence. Appellant entered a plea of nolo contendere, specifically reserving his right to appeal, to an information charging him with unlawful sale of Cannabis sativa L. in excess of five grams, in violation of Section 893.13, Florida Statutes (1977).

Appellant's principal contention is the trial court erred in not suppressing the evidence because it was gathered under a warrantless search and seizure of a dwelling house.

In the course of an undercover investigation relating to controlled substances, police officers of the City of Miami made initial contact with one Ramirez. Ramirez supplied them with the information relating to the sale of marijuana from appellant's residence. On the same day as his initial contact and in cooperation with police officers, he made a telephone call to the home for an appointment to inspect and possibly purchase marijuana. Ramirez and Meeks, a police officer, under the guise of making a purchase, went to the home where they were invited in by the appellant. After introduction, they were invited by appellant to inspect cardboard cartons containing marijuana which were located in the rear bedroom of the home. Meeks was given an opportunity to open the cartons and inspect the contents which he recognized as marijuana. Arrangements were concluded to purchase a quantity of the marijuana at a specified price. Meeks then advised appellant and his confederates that he had to return to his car to obtain the cash with which to conclude the sale. Upon being advised that this was upsetting to the appellant and others, Meeks instructed Ramirez to retrieve the money from the automobile.

By prearranged plan, law enforcement officers were stationed in surveillance positions outside the home. Under the plan, Meeks was supposed to exit the home to retrieve the money. Instead, Ramirez came out of the house and exclaimed: "Okay, we can. We saw the grass. It's in the house." Because Officer Meeks did not exit as planned, Officer Martinez, waiting in surveillance, became concerned for Officer Meeks' safety and drew his weapon and ran toward the home. Regalado, a companion of the appellant who was watching from the window, stated to Meeks who was inside: "This is a bust." Meeks testified that when the occupants realized it was a raid, he drew his revolver and prior to the entry of Officer Martinez into the home, ordered: "police officer, freeze." Officer Martinez then entered the home followed by other undercover agents and a uniformed deputy sheriff who detained all of the occupants.

It is undisputed that Martinez and the others entered the home without knocking or announcing their authority or purpose. Officer Martinez testified that he led this assault because he perceived that to have demanded entrance would have increased Officer Meeks' peril. Meeks and others from the raiding party then began a systematic search of the house. They proceeded to the rear bedroom where Meeks had previously seen the cache of marijuana. More than two hundred pounds was seized. This was the marijuana which was the subject of the motion to suppress below.

Appellant concedes that Officer Martinez had probable cause to believe that a felony had or was being committed. Appellant, however, maintains that Officer Martinez' failure to knock and announce his authority

and purpose violated Section 901.19(1), Florida Statutes (1977) ("knock and announce statute") and therefore vitiated a valid arrest and rendered the fruits of the search and seizure inadmissible. The State counters with the contention that the arrest was effectuated as a "no knock" exception to the statute as announced in *Benefield v. State,* 160 So.2d 706 (Fla. 1964). Left with no viable alternative, we might well affirm the denial of the motion to suppress as a *Benefield* exception to the cited statute. However, there is, on this record, a more substantial basis upon which to affirm. In *Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), undercover federal agents, posing as potential buyers of marijuana, were invited by the defendant to his home for the specific purpose of purchasing narcotics. As the sales were consummated, defendant was arrested and prosecuted for the illegal sale of marijuana. The marijuana purchased by the agent was admitted into evidence. The defendant sought to exclude the evidence on the basis that the agent, by disguising his identity and entering defendant's home, had invaded the defendant's Fourth Amendment right to privacy. The Court rejected this contention holding:

> Without question, the home is accorded the full range of Fourth Amendment protections . . . [b]ut when, as here, the home is converted into a commercial center to which outsiders are invited for the purpose of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.

The record in this case closely parallels that of *Lewis v. United States* which we consider controlling.[1]

Here, Officer Meeks had gained entrance to the appellant's home posing as a potential buyer of marijuana. He was invited in and saw and inspected the marijuana which he recognized as contraband. Officer Meeks first detained the appellant and others, then he gathered the marijuana which he had previously inspected and identified. Consequently, Officer Meeks was in the identical position as were the federal drug agents in *Lewis v. United States.*

A flawless elaboration of the full rule emanating from *Lewis v. United States,* supra, was carefully articulated by Judge Hubbart in *Pomerantz v. State,* 372 So.2d 104, 110 (Fla.3d DCA 1979):

> In a long line of cases, the Florida and federal courts have held that it is not a search for the police to discover evidence in plain sight. The warrantless seizure of such evidence is constitutionally permissible providing three requirements are met: (1) the police must observe the evidence in plain sight without benefit of a search [i.e., without invading one's reasonable expectation of privacy], (2) the police must have a legal right to be where they are when they make the plain sight observation, and (3) the police must have probable cause to believe that the evidence

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[1]Art. I, §12, Fla.Const. (1968) as patterned after U.S. CONST. amend. IV.

> seen constitutes contraband or fruits, instrumentalities or evidence of crime. . . . Such plain sight seizures have been treated either as an exception to the search warrant requirement rule, . . . or as being entirely beyond the scope of Fourth Amendment protection. . . . In any event, a search warrant is not required in order for the police to conduct such a constitutional seizure.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT
JANUARY TERM, A.D. 1980
FRIDAY, JANUARY 18, 1980

CASE NO. 79-631

ISRAEL PRECES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: William R. Tunkey
Jim Smith

/sh

NOTE:

IN THE EVENT A MOTION FOR STAY IS NOT APPLIED FOR, THE MANDATE IN THE ABOVE STYLED CAUSE WILL AUTOMATICALLY ISSUE AFTER THE EXPIRATION OF FIFTEEN DAYS FROM DATE HEREOF *WITHOUT FURTHER NOTICE.*

SUPREME COURT OF FLORIDA

THURSDAY, AUGUST 21, 1980

CASE NO. 58,597

District Court of Appeal,
3d District — No. 79-631

ISRAEL PRECES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla.R.App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P.9.330(d).

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur SUNDBERG, C.J., dissents

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Ellen M. Gable, Judge
Hon. Richard P. Brinker, Clerk

William R. Tunkey, Esquire
Susan Minor, Equire

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: Dubline Causseaux
Deputy Clerk